Esmark, Inc. *and* United Food and Commercial Workers International Union, AFL–CIO. Case 13–CA–21156–S

December 16, 1994

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS DEVANEY AND BROWNING

The issue in this case, before the Board on remand from the Court of Appeals for the Seventh Circuit,[1] is the liability of a parent corporation for unfair labor practices in which its wholly-owned subsidiary engaged.[2] On June 29, 1988, the Board issued a Decision and Order[3] in which it found, inter alia, that the Respondent Esmark, a holding company, violated Section 8(a)(3) and (1) by virtue of its direct participation in the decision to close two plants[4] of a subsidiary[5] and terminate the unit employees in order to evade contractual obligations and violated Section 8(a)(5) and (1) by its direct participation in the subsidiary's decision to abrogate the contract at the facilities when they reopened. The Board ordered Esmark, inter alia, to make the employees whole for their losses resulting from the unfair labor practices.

On October 6, 1989, the court of appeals granted Esmark's petition for review and remanded the case to the Board for ''further factual development'' of the ''direct participation'' theory on which the Board had based its finding that Esmark was liable for the violations arising out of the subsidiaries' closing and reopening of the facilities. Accordingly, the Board remanded the case to the judge, who, after hearing additional testimony and reviewing the prior record, found nothing in the record not considered by the Board or the court and recommended dismissal of the complaint as to Esmark.

We agree in part and disagree in part with the judge. Accepting as the law of the case the court majority's characterization of the ''direct participation'' theory, we agree with the judge that the record does not support a finding that Esmark violated Section 8(a)(5) and we adopt his dismissal of the 8(a)(5) allegations.[6] We disagree, however, with the judge's dismissal of the 8(a)(3) allegations, and, without relying on the direct participation theory, we find that the record contains ample evidence of Esmark's liability under Section 8(a)(3) and (1) of the Act. Accordingly, we find that Esmark violated Section 8(a)(3) and (1) and we shall order it to take appropriate action to remedy its unfair labor practices. Our reasons follow.

A. *The Law of the Case and the Issues Remaining on Remand*[7]

1. The alleged violations of Section 8(a)(5)

In its decision, the court unanimously held that the Board's basis for finding Esmark liable for its subsidiaries' unfair labor practices, Esmark's direct participation in the transactions involved, ''is a viable theory of intercorporate liability which may be employed by the Board to hold a parent corporation . . . liable for the unfair labor practices of a subsidiary corporation.''[8] The court majority, Judges Easterbrook and Flaum,[9] however, found that the Board had failed to make ''specific findings that [Esmark's] power of con-

[1] *Esmark, Inc. v. NLRB*, 887 F.2d 739 (1989).

[2] On June 27, 1991, Administrative Law Judge William F. Jacobs issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief; the Charging Party filed cross-exceptions and a supporting brief; the Respondent filed an answering brief to the exceptions and cross-exceptions; and the Charging Party filed a reply brief to the Respondent's answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order only to the extent consistent with this decision.

The Charging Party has excepted to the judge's grant of the Respondent's petition to revoke parts of its subpoenas of documents which SIPCO had attempted to introduce into evidence in a civil lawsuit between Esmark and SIPCO, which the parties dropped on September 14, 1990. The Charging Party contends that SIPCO's position in that lawsuit was that relieving Esmark of liability for the closing of the Moultrie and Guymon plants would be contrary to public policy as Esmark had been instrumental in the closings. Without passing on the propriety of the judge's summary grant of the Respondent's petition to revoke parts of the Charging Party's subpoenas, we decline to reconsider his action. In our view, even if the evidence obtainable through the subpoenas were to demonstrate the facts argued by the Charging Party, such evidence would not, under the law of the case, establish a violation of Sec. 8(a)(5) on Esmark's part.

[3] *Swift Independent Corp*., 289 NLRB 423 (1988). In this case, the Board found that Swift, Esmark, and other companies had violated the Act. Esmark is the only respondent who is a party to this petition for review.

[4] These plants were operated by Swift & Co., an Esmark subsidiary, at Guymon, Oklahoma, and Moultrie, Georgia.

[5] The subsidiary was SIC/SIPCO/New Sipco. SIC was a holding company wholly owned by Esmark until April 11, 1981. SIC's assets consisted of the stock of SIPCO, a corporation operating fresh meat packing plants previously owned by Swift, and New Sipco, a corporation operating the two fresh meat plants at Moultrie, Georgia, and Guymon, Oklahoma, also previously owned by Swift. SIC, SIPCO, and New Sipco were former Respondents in the instant case and, with Esmark, were found to have violated Sec. 8(a)(5), (3), and (1). The other Respondents having reached a settlement, only Esmark's liability under the Act remains at issue.

[6] The court majority's characterization of the ''direct participation'' theory is discussed in sec. A,1, below.

[7] In addition to the issues discussed here, the court upheld the Board's findings that the complaint is not barred by Sec. 10(b); that the sham closing of the Moultrie and Guymon plants was inherently destructive of employees' Sec. 7 rights under *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); and that Esmark's argument that SIPCO is its successor respecting Moultrie and Guymon by virtue of the transfer of about 65 percent of Esmark's stock so that the law of successorship applies to SIPCO is without merit.

[8] *Esmark, Inc*., supra, 887 F.2d at 759.

[9] Judge Cudahy dissented and would have enforced the Board's Order in its entirety. Id. at 759.

trol [as a stockholder] was exercised through improper means'' and to provide adequate factual support of its finding that ''Esmark made SIPCO's decisions for it, without any concern for SIPCO's separate legal identity,'' so as to justify establishing liability under this ''limited, transaction-by-transaction theory of piercing the corporate veil.''[10] The court noted that the Board has held a stockholder liable for unfair labor practices ''nominally carried out by a corporation'' when two elements are present: the shareholder participated actively in the decision to commit the particular wrong and the shareholder's control was exercised '''directly,' outside the normal channels of corporate decisionmaking.''[11] The court found these holdings consistent with the corporate law principle that, although corporations meeting certain criteria, as Esmark does here, are not customarily held liable for subsidiaries' wrongful acts, courts will impose liability where the parent directly participates in the wrong. The court emphasized that stock ownership alone is insufficient, but a parent's disregarding orderly corporate procedures and intermeddling in the transactions of the subsidiary at issue can be a basis for liability. Thus, the court unanimously approved the Board's policy of finding, in extraordinary cases, that a parent corporation is derivatively liable for a subsidiary's wrongdoing even where the parent did not directly injure the third party. The court majority, however, found that the Board had failed to show, not just that the parent had actively participated in the transaction, but that its participation was ''impermissibly direct,'' i.e., that the parent disregarded its subsidiary's separate legal identity and ''decisionmaking 'paraphernalia.'''[12]

We view the court's remand of the 8(a)(5) issue under the court majority's characterization of the ''direct participation'' theory as requiring a showing that, with respect to the closing and reopening of the Moultrie and Guymon plants, Esmark and its managers actively stepped into the shoes of SIPCO's board and officers and controlled their actions to the point of bypassing SIPCO's leadership and ignoring such accepted procedures of corporate administration as the election of a board and appointment of officers; the holding of board meetings and voting on resolutions; and the direction of the subsidiary's activities by its own officers. The court majority seeks evidence that Esmark officials bypassed the subsidiaries' corporate structures in an improper manner. This last factor is not present here. The record does not contain sufficient evidence, not already considered by the court, to support a finding under the law of the case that the Esmark officials' control of the close and reopen scheme was procedurally improper, in the sense of bypassing corporate formalities, so that Esmark would be liable under Section 8(a)(5). Thus, we adopt the judge's dismissal of that allegation.

[10] Id. at 758, 760.

[11] Id. at 758, discussing *Riley Aeronautics*, 178 NLRB 495 (1969).

[12] Id at 757.

2. The alleged violations of Section 8(a)(3) and (1)

The court also remanded for different reasons the Board's finding that Esmark violated Section 8(a)(3) by its direct participation in the sham closing and reopening of the Moultrie and Guymon plants. Noting that the language of 8(a)(5), which requires an employer to bargain in good faith with respect to ''his employees,''[13] differs from that of Section 8(a)(3), which prohibits discrimination by ''an employer,''[14] the court commented:

> We recognize that Esmark was also found liable for related violations of [Section] 8(a)(3). And it may be that [Section] 8(a)(3) does not narrowly confine liability to one who is the employer of the employees aggrieved by a particular unlawful course of conduct. However, it is unclear whether the Board would have entered the same remedial order in the absence of its finding of a [Section] 8(a)(5) violation, and we therefore assume that, if the [Section] 8(a)(5) finding is improper, a remand to the Board will be necessary to redetermine the extent of Esmark's liability.[15]

We agree with the court that Section 8(a)(3) permits a finding of liability with respect to employers not standing in a direct employment relationship with affected employees. We note that such a policy comports with settled Board precedent, as our discussion of cases, below, demonstrates. We find no basis in the court's decision for Esmark's claim that the court found that Esmark can be liable under Section 8(a)(3) only as a ''direct participant.'' Rather, we read the court's comments as stating that, in its view, the limiting language of Section 8(a)(5) requires a factual basis for piercing Esmark's corporate veil and bypassing Esmark's shareholder immunity from its subsidiary's obligations to find it liable for SIPCO's violation of that provision. The court explicitly allowed for the possibility that Section 8(a)(3) imposes no such requirement, and, as noted above, we agree with the court. We find that under the law of the case, the Board could find that a parent corporation should not be permitted to act through its subsidiaries to the detriment of the subsidiaries' work force and yet escape liability for acts it has mandated, and that if the Board

[13] Sec. 8(a)(5) prohibits an employer from ''refus[ing] to bargain collectively with the representative of his employees . . . .''

[14] Sec. 8(a)(3) makes it an unfair labor practice for ''an employer'' ''by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .''

[15] *Esmark, Inc.*, supra, 887 F.2d at 753 fn. 22.

can demonstrate Esmark's liability under Section 8(a)(3), the court would be receptive to such findings and enforcement of an order of the appropriate remedial acts. We make such a finding here.

B. *Facts*

Esmark's role in transforming employment conditions in the bargaining units at the Moultrie and Guymon plants from those set by the master agreement[16] to terms more favorable to management is well documented in the Board's 1988 decision. Briefly, to increase the value of its stock, Esmark decided in 1980 to divest some of its assets, including the fresh meats division of its subsidiary Swift & Company, a packer of fresh and processed meats. Accordingly, Esmark divided Swift into two new corporations, the first a processed meat packer, which remained part of Esmark, and the second a fresh meats packer, some stock of which Esmark offered to the public in April 1981 ''as an ongoing, self-sufficient enterprise,''[17] and which were respectively christened Swift and SIC/-SIPCO/New Sipco (SIPCO). The operative facts arise from the creation of the second entity, the SIPCO sale package. The process of setting up and marketing SIPCO involved many steps, briefly highlighted here, some of which are alleged to have violated the Act.

In April 1980,[18] Esmark President Kelly informed Swift vice president Copeland of the decision to divest Swift of its fresh meats division. Kelly announced that he was appointing a new Swift president, Sullivan,[19] and ordered Copeland to formulate a plan to transform Swift's fresh meats division into a separate company to be sold by Esmark. Further, Kelly instructed Copeland that henceforth he would report, not to Sullivan, but to Kelly himself.[20] Kelly and Copeland maintained a ''very informal type reporting relationship,'' but Kelly ''expected [Copeland] to keep him posted,'' and Copeland testified that he and his team cleared all decisions respecting the new company with Kelly or other Esmark executives: ''Esmark [sic] we were working hand in glove with them. I was working directly for Don Kelly, and we were trying to put together a company that we were going to offer for sale so you bet. I was there talking to them constantly.'' Other Esmark executives were involved in structuring the sale package, most notably Esmark Assistant General Counsel Karl Becker, whose duties included overseeing the divestiture's financial structuring. Richard Knight, a Swift vice president, later became the new company's vice president for beef, lamb, and labor. J. Douglas Gray, a former executive in the fresh meats division, also worked with Copeland and later became vice president of SIC.

After the Union rejected Esmark's proposal for an employee purchase plan of the fresh meats division in June,[21] Kelly and Esmark management decided that the division should close down.[22] Copeland, who had anticipated the ESOP's failure, had other ideas. He proposed a plan, approved first by Kelly and then by Esmark's board on June 26, to close or dispose of some fresh meats ''facilities of Swift & Company . . . and facilities which do not fit into its long-range plans, and the payment of transitional costs . . . . The remaining units of Swift Fresh Meats Division to become a separate company, to be sold by Esmark with Esmark possibly retaining an ownership position.''[23] As further discussed below, however, Esmark changed its strategy during the latter half of 1980 and determined that a public offering of some of the stock in the new corporation, rather than an outright sale of the business, would provide a greater return on the sale package.

The plants to be closed were viewed as troubled operations whose inclusion in the sale package would detract from its sales appeal. The Moultrie and Guymon plants were to close because they operated under the

[16] The master agreement was a collective-bargaining agreement negotiated by the Union and Swift & Co. and Estech, another Esmark subsidiary. The relevant agreement was in force from September 1979–September 1982. The record indicates that Esmark representatives participated in negotiating the master agreement's benefits provisions.

[17] *Esmark, Inc.*, supra, 887 F.2d at 751.

[18] Unless otherwise noted, all subsequent dates are in 1980.

[19] Sullivan was formerly president of Estech and a member of the Esmark management committee.

[20] Copeland acknowledged in the reopened hearing that his new functions involved a conflict of interest with his actual employer, Swift, and that he could not perform them if he were to report to Swift's president. His testimony reflects his lack of involvement with Swift and its corporate structure during the process of building the sale package: ''Only conversations I can remember having with Swift & Company was dividing up the staffs in the areas we had to staff ourselves.'' Copeland's testimony indicates that he went directly to Esmark with questions or issues involving the structure of the sale package.

[21] Kelly announced at the April 25 meeting that he was considering using an employee stock ownership plan, or ESOP, to rid Esmark of the fresh meats division. Becker worked out the details of the ESOP proposal and the Esmark board of directors approved the plan on May 29. Esmark Vice President Palenchar acted as the spokesman for Esmark's effort to persuade the Union to accept the ESOP proposal.

[22] This decision was made by Esmark and Kelly. According to Swift President Sullivan's testimony, he did not participate in it.

[23] Minutes, meeting of Esmark, Inc., board of directors, June 26, 1980. Esmark retained complete control over the decision as to which facilities would remain in Swift and which would go into the sale package. As Copeland testified: ''Swift went to Esmark and asked if they could keep the San Antonio plant, but we prevailed. . . . We wanted it and we got Esmark to agree that we could take it. . . . they [Esmark] made a decision on every unit we took. [Q. And who at Esmark . . . ultimately approved your recommendations . . . ?] Well, I can't imagine that Don Kelly didn't have somebody bring him in and say this is what the company is asking for and give his views and he would eventually say yes or no because I just can't believe the corporation would work where you're just selling major facilities without chief executives knowing about it.''

master agreement,[24] which, in light of their locations and other circumstances, meant that their labor costs were higher than desirable. Copeland soon became convinced that Moultrie and Guymon were viable plants and their inclusion would increase the value of the sales package.

On June 30, Knight told the Union that some plants, including Moultrie and Guymon, would close December 28. In August, however, Union official Anderson was informed that the Moultrie and Guymon plants were suitable for inclusion in SIPCO[25]—except for the high cost of the master agreement. Copeland asked if the Union would modify the agreement and reduce wages and benefits at Moultrie and Guymon; if the Union agreed, the plants would be kept open and retained in the SIPCO package. Anderson refused.[26] In July, in response to Kelly's directions, Copeland and others prepared a brochure on the fresh meats operation for Kelly to show to European investors. The brochure stated that if the Union would not grant midterm concessions at the Moultrie and Guymon plants they would be closed, but could be reopened shortly after purchase with lower labor costs. In September, as the Union maintained that the master agreement would not be modified, Copeland and other officials told Anderson that Esmark's plan was to close the plants; once Esmark sold SIPCO, the plants would be reopened under less costly local agreements.[27]

Although the Union adamantly opposed modifying the master agreement, it did not initially oppose the close and reopen plan, always providing, Anderson cautioned, that the arrangement was lawful.[28] When Knight and Copeland first discussed with the Union their desire to get rid of the master agreement, Esmark had not finally decided to offer its stock to the public. Throughout the summer, Knight, Copeland, and Anderson were apparently discussing a reopening by a successor employer, a purchaser of the business. Knight's testimony indicates that he had nothing to do with the decision to substitute a stock offering for the sale of the business and that he and Anderson worked on the assumption that the business would be sold. Neither he nor Copeland himself learned for certain until late October that Esmark was planning a public offering of SIPCO stock. Copeland testified that ''during the summer, as we were developing final plans for the company that was going to be offered for sale, the Esmark people became more and more impressed . . . and a couple of times they said that maybe we ought to talk about this as a public offering.''[29]

Thus, Copeland, Knight, and the SIPCO sale team were attempting to ready the business for sale. Esmark, on the other hand, was acting directly and alone in arranging the financial structuring of the deal that ultimately became the public offering of SIC stock. Esmark Financial Vice President Briggs had authority to approve the deal and worked with outside underwriters to arrive at an offering attractive to investors. The record indicates that appeal to investors was the paramount consideration with respect to every aspect of the arrangements. For example, Esmark based its decision on the debt it would take back from SIPCO on how it would affect SIPCO's market appeal. Becker testified that ''the overriding factor would be [the] load on the new company. We're attempting to create a company that would be viable. If that company were saddled with . . . heavy [debt] . . . it would cause problems in trying to market the stock.'' Becker also prepared the prospectus used by Esmark for the stock offering. In connection with its preparation, Becker discussed the ''labor situation'' at the Moultrie and Guymon plants with Knight. The prospectus, released at the time of the stock sale, reiterated the plan for the Moultrie and Guymon plants, but with a new twist: instead of being reopened by a purchaser, the Moultrie and Guymon plants were to be reopened by an Esmark subsidiary:

> [L]abor costs at these plants under the Master Agreement . . . were significantly higher than those prevailing at many plants in their respective areas. A new subsidiary of the Company intends to open Guymon and Moultrie shortly after completion of this offering with the objective of achieving competitive labor costs at these facilities.[30]

[24] See fn. 16, supra.

[25] At this point, the sale package began to be called SIPCO, although SIPCO still did not exist as a corporation. Esmark's continuing involvement in the setting of policies for the gradually forming entity is reflected in an August 8 memorandum of J. D. Gray: ''SIPCO intends to rely on Esmark/Swift for counsel and review of all major decisions . . . .''

[26] Anderson was adamant that the Union would not alter the master agreement. The Union's insistence on holding the employer to the terms of the master agreement was matched by the Company's determination to get rid of it. Knight testified that early in the process of negotiating with Anderson, the SIPCO team viewed the master agreement as ''dead'' at Moultrie and Guymon.

[27] Knight testified that he explicitly told the Union that Esmark was going to close the plants. He amplified: ''We were still Esmark. I was Esmark, in my view. We were going to close; then I was going to be Swift Independent Packing Company [SIPCO] . . . and we were going to open it.''

[28] Anderson became increasingly convinced that the arrangement was in fact unlawful after he was informed that a stock offering was contemplated.

[29] Consistent with our earlier finding that closing Moultrie and Guymon and discharging the employees was inherently destructive of employee rights and the court's affirmance of that finding, we do not now inquire into the motivation for the sham closing and the discharges.

[30] Thus, as Judge Cudahy noted, the prospectus ''lays out in detail what will happen and why it will happen months in advance of the events themselves.'' *Esmark, Inc*., supra, 887 F.2d at 759.

In late October, SIPCO was born; on October 24, Swift's name was changed to SIPCO; on October 27, Swift's directors resigned from the SIPCO board and Copeland appointed a new board, including two members designated by Kelly.[31] On October 28, Anderson was told that Moultrie and Guymon would close December 28 but would reopen in January, free of the master agreement, after SIPCO's stock was sold to the public.

In December, the Union was told that SIPCO had become a separate corporation on October 27 and that the process of making SIPCO ''truly independent'' of Esmark—for Esmark owned 100 percent of 6-week-old SIPCO—would be completed in Spring 1981.[32] The Union was reminded of the plan to close the Moultrie and Guymon plants in December 1980, all costs paid by Esmark, and to reopen them in early 1981 ''as non-master agreement units'' and was told that if Esmark's transforming SIPCO into a ''publicly held independent corporation'' (i.e., the public offering of SIPCO stock) took longer than expected after the plants were reopened, they would operate under the master agreement for the duration.[33]

SIPCO's maturation into a ''truly independent'' corporation continued into 1981. To avoid keeping the plants closed for a long time before they reopened, Knight asked Anderson on December 17, 1980, to agree to reopen the Moultrie and Guymon plants before the stock sale, rescheduled for March.[34] Anderson refused, reiterating that the close and reopen scheme was unlawful. Ultimately, Esmark sold 65 percent of the stock in SIC (the Esmark subsidiary holding the corporations encompassing the fresh meats operations)[35] to the public on April 22, during the week after the Moultrie and Guymon plants were closed and the unit employees discharged on April 17.[36]

The Moultrie and Guymon plants reopened in early May as operations of ''New SIPCO,'' a wholly owned subsidiary of SIC. For the newly hired ''New Sipco'' employees, who were virtually all unit employees discharged by SIPCO, only one aspect of their employment changed after their termination and rehire: they no longer enjoyed the terms of the master agreement.[37] SIC/New SIPCO enjoyed reductions in labor costs by virtue of the new terms of employment of about $4 million annually.

C. *Conclusions and Applicable Law*

As noted above, our reexamination of the record pursuant to the remand has led us to agree with the judge that the record does not support a finding of a violation of Section 8(a)(5) under the direct participation theory as enunciated by the court majority. However, we have found no basis to disturb our earlier finding that Esmark played a key causal role in the unlawful transactions delineated in our previous decision[38] and that Esmark, through its vigorous and detailed exercise of its right of ownership over Swift's fresh meats division, violated Section 8(a)(3) and (1) of the Act. As discussed in section A, above, our reaffirmation of our earlier finding is entirely consonant with the court's discussion of the 8(a)(3) issue. We interpret the court's remand as requiring the Board to clarify the ''extent of Esmark's liability'' by demonstrating (1) a basis in the factual record for a finding that Esmark is liable under the direct participation theory for an 8(a)(5) violation against ''his employees,'' viz., the unit employees at the Moultrie and Guymon plants and/or (2) the extent of Esmark's liability under Section 8(a)(3). We pursue the latter course here.

The linchpin of Esmark's argument that it should not be held liable for the unlawful sham closing is its insistence that it did not close the two plants directly; they were closed by SIC/SIPCO/New Sipco. But that argument will not shield it from liability in light of the facts outlined above; under Board law, Esmark can be liable for discrimination against employees of another employer if under certain circumstances it caused that employer to violate the Act. ''The Board has consistently held that an employer under Section 2(3) of the

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[31] SIPCO declared a dividend to Esmark on October 27 of the processed meats division stock. That stock formed the new Swift & Co. SIPCO was now complete except for the disposition of Moultrie and Guymon.

[32] Unless otherwise noted, all subsequent dates are in 1981.

[33] The requests to delay the closings or to reopen the plants before the ostensible change in ownership were motivated by Copeland and Knight's care to ensure that the value of the sale package—including Moultrie and Guymon—be undiminished, or, as Knight put it, ''to launch the company in a better light.'' As Knight testified: ''the objective was not to have the plants close down or idle . . . any longer than a week or two . . . . [W]e would lose supply of livestock sales and that was a very great concern for John Copeland.'' Another key reason for keeping the plants' idle period as short as possible was to retain the experienced labor force, as Knight testified.

[34] The closing of Guymon and Moultrie, scheduled to coincide with the sale of the stock of the new company, had to be delayed, because, as Becker testified, ''[t]he people at Esmark were working on preparing the documents, the registration statement, for the public offering and had some substantial responsibility in connection with these documents. They weren't being prepared as fast as was originally planned.''

[35] At the end of the sale Esmark controlled about 35 percent of SIC stock.

SIC was entirely an Esmark creation. Becker personally selected SIC's incorporator and instructed him as to the details of the arrangement; selected SIC's initial director; and initially drafted the minutes of SIC's meetings before the director's signature was affixed.

[36] Esmark paid the costs of the plant closings in full. Judge Cudahy commented that Esmark has nowhere explained this action, ''which would suggest that the entire transaction [the close and open scheme] was intended to benefit Esmark directly, and that Esmark undertook a direct obligation to the displaced workers.'' *Esmark, Inc.*, supra, 887 F.2d at 759.

[37] See id. at 745 fn. 4.

[38] See *Swift Independent Corp.*, 289 NLRB 423, 430 fn. 18 (1988).

Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship.''[39] In cases where violations of Section 8(a)(3) are alleged, ''[a]n employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affect the working conditions of the latter's employees because of the union activities of said employees.''[40] Under this theory, the Board has found liable, e.g., a general contractor for pressuring a subcontractor to discharge union employees,[41] and an employer using contract labor for informing the manpower company that it should not send union members to the employer's facility.[42]

Imposition of liability on this basis does not require a finding either that Esmark and SIC/SIPCO/New Sipco were single or joint employers or a piercing of the corporate veil to find that Esmark exercised its powers of ownership improperly. Rather, Board precedent specifically acknowledges and accounts for the detrimental effect of the influence on a company's labor policies of certain ''business dealings'' by an outside employer on employees' right to be free from discrimination for their protected activities. In this case, where the business dealings between Esmark and the nascent SIPCO consisted, until April 1981, of Esmark's right as sole owner to determine the continued existence or demise of the company, and given the nature of those dealings as outlined above, the applicability of such precedent—and the necessity for applying it—are clear.

The frequency with which employers depend on the good will of other employers for survival necessitates imposing liability under Section 8(a)(3) on third-party employers under certain circumstances. A contrary practice of limiting liability to the immediate employer when another employer has caused it to discriminate against its employees would place limitations on employee freedom from discrimination under Section 8(a)(3). The Board has found that the statutory purpose of protecting employees from discrimination is served by holding liable a general contractor for knowingly using economic power to cause other employers to discriminate.[43] It follows that this purpose will be served all the more directly by a finding of liability here, where the unfair labor practices were initiated while the third party, the parent company, was in the process of determining the extent and nature of the direct employer's continued existence. Indeed, the third party had some involvement in negotiating the abrogated agreement, and it found its net worth significantly and directly enhanced by the unfair labor practices. As the court noted in affirming the Board's finding that the unlawful conduct in this case was inherently destructive of employee rights: ''Workers would wonder . . . why collective representation, with its attendant costs, is worthwhile if their employer can manipulate things so easily by selling assets and restructuring the holding company hierarchy.''[44] The Act permits a finding of liability under Section 8(a)(3) outside the direct employer/employee relationship and we find these words especially resonant here in view of the facts summarized above. Thus, in our view, the record and our policy of protecting employees' Section 7 rights fully justify holding Esmark liable for the sham closure of the Moultrie and Guymon plants and the discharge of the unit employees.

Esmark's divestiture of Swift's fresh meats division followed two lines of development that converged at the public offering on April 11: Copeland's structuring of SIPCO and Esmark's marketing of the sale package. These lines progressed unevenly over several months, but had the key common purpose of obtaining for Esmark the maximum return for its sale of SIPCO. The abrogation of the master agreement at the Moultrie and Guymon plants was one result of Esmark's determination to augment the value of the SIPCO sale package and ultimately of its own stock. Esmark stood to benefit by offering purchasers and, as plans changed, investors a company that included the Moultrie and Guymon plants—with the skilled employees, but without their inconvenient statutory and contractual rights. Esmark's decision to reject selling the fresh meats division as a business in favor of offering SIC's stock altered the shape and significance of the SIPCO deal. When Esmark perceived that its interests would be better served by a stock sale, the closing of the plants with the intent to reopen them outside the master agreement became a sham,[45] because, as the Board and court held, SIPCO could not be its own successor.[46] Thus, the master agreement was still applicable, and the discharge of the employees for no other reason than that the master agreement had been negotiated, with Esmark's participation, on their behalf, violated Section 8(a)(3) and (1).

[39] *International Shipping Assn.*, 297 NLRB 1059, 1059 (1990) (citations omitted).

[40] *Dews Construction*, 231 NLRB 182, 182 fn. 4 (1977), enfd. mem. 578 F.2d 1374 (3d Cir. 1978) (citations omitted).

[41] Id.

[42] *International Shipping Assn.*, supra, 297 NLRB at 1059.

[43] See *Dews Construction*, supra, 231 NLRB at 182 fn. 4 (a general contractor held liable where it caused a subcontractor to discriminatorily discharge an employee), and *International Shipping Assn.*, supra, 297 NLRB at 1059 (a company held liable where it caused a manpower firm to discriminatorily withdraw employees from the company's facilities).

[44] *Esmark, Inc.*, supra, 887 F.2d at 749.

[45] See id., 887 F.2d at 749.

[46] Id., 887 F.2d at 749–750; see also the Board's previous decision, *Swift Independent Packing*, supra, 289 NLRB at 430 fn. 15.

Moreover, Esmark had anticipated the closing of the Moultrie and Guymon plants and the discharge of the employees to get rid of the master agreement for months, as it had involved itself in the sham closing from start to finish on three distinct levels. First, Kelly's course of conduct enmeshed Esmark. Kelly, Esmark's president, acting in his official capacity, gave the initial marching orders that resulted in the sham closing, clothed Copeland with the authority to dispose of assets and otherwise to structure the sale package, received reports directly from Copeland regarding the arrangements, and represented to prospective buyers that the Moultrie and Guymon facilities could be closed and then reopened without the master agreement. Indeed, the record demonstrates that Esmark, directly through its president, Kelly, was responsible for the plan to maximize profits on the sale of the Swift fresh meats division and knew that part of the plan involved freeing the Moultrie and Guymon plants from the perceived liability of the master agreement. Although Copeland may have originated and promoted the idea of keeping the Moultrie and Guymon plants in the sale package, his determination that the way to do so was to abrogate the contract was a direct response to the theme played through every aspect of the divestitures: i.e., maximize the package's market appeal. It was also a mark of his obedience to the explicit orders of his superior and business associate, Kelly, to transform the fresh meats division into an attractive saleable unit. Other options existed but were not ultimately chosen because, as Knight testified, the intentions and desires of SIPCO's architects were both emphatic and specific. They wanted to augment the sale package with two modern, efficient plants with modest labor costs—but not, however, with the Moultrie and Guymon plants *as they actually existed*, complete with wage and benefit rates negotiated less than a year before.

Second, the record also demonstrates that Esmark's executives and its board of directors furthered Esmark's involvement in the Moultrie and Guymon deal by ratifying decisions made by the SIPCO team, both through official acts and through their course of conduct. Kelly and the Esmark board officially passed on all major decisions of the sales team, as Copeland's testimony and the minutes of the board meetings demonstrate. Further, as its own written materials show, Esmark had actual knowledge of the close and reopen scheme and openly expressed approval of it, embraced the plan as its own, and used it as a selling point in its efforts to market the fresh meats division, including a discussion of it in the sales brochures Copeland prepared for prospective buyers of the business and Becker prepared for the public offering of SIC stock.

Third, this executive and structural involvement was deepened and focused by the need of Esmark's executives, in preparing for the stock offering, to know the facts of the SIPCO deal, including the details of the effort to get out from under the master agreement. Esmark, not SIPCO, offered SIC's stock to the public, and Esmark bore the responsibility under the securities laws of disclosing all facts relevant to the value of the stock. The record shows that when Esmark executives needed to know what was going on with Moultrie and Guymon, they asked, and were fully briefed by Copeland's team. Becker testified explicitly that he had reviewed the labor situation at the Moultrie and Guymon plants with Knight to prepare for the public offering.[47] Most importantly, Esmark executives knew of and were involved in the deal encompassing the sham closing both before and after the decision to use a stock transfer to market the fresh meats division. Thus, Esmark, more than any other entity involved in the divestiture, was aware of and ultimately controlled both the overall shape of the deal and the details of the close and reopen scheme. It also was the only party that could have acted to avert the sham closings. Whatever reasons Esmark may have had for allowing the close and reopen scheme to continue after the change to a public offering, the record contains no basis for excusing Esmark from responsibility for its pivotal role in the unlawful acts.

In light of this overwhelming evidence, Esmark's arguments in its defense are unpersuasive. Esmark contends that it had nothing to do with the close and open decision and argues that Kelly accorded Copeland relative freedom of action. We do not accept Esmark's assessment of the significance of Kelly's style of management. In Esmark's view, the relationship between Copeland and Kelly adds up to nothing: no authority, no subordination, no instructions, no reporting. The record, however, belies this view. It indicates, instead, that Kelly clearly clothed Copeland with the authority to act on Esmark's behalf in preparing the fresh meats operations for sale. Copeland's authority to create the new company, appoint its directors, and dispose of its assets derived solely and entirely from Kelly's personal appointment of him to exercise Esmark's power of ownership over the division. The record further demonstrates that Kelly, having issued a mandate to his experienced and resourceful subordinate, allowed him to carry out his mission without ''micromanaging'' his activities, but that Kelly was never out of touch with Copeland and maintained an unflagging interest and involvement in exactly what Copeland was doing in structuring SIPCO. Further, Copeland's own testimony about his relationship with Kelly belies the assertion that Kelly had no responsibility for the SIPCO deal and those aspects of it that were unlawful

[47] As Judge Cudahy commented, ''Esmark's securities counsel evidently required a fullness of disclosure which is now embarrassing to its labor counsel.'' *Esmark, Inc.*, supra, 887 F.2d at 759.

under 8(a)(3).[48] As Copeland expostulated, it is simply incredible that a chief executive like Kelly would countenance unreviewed and uncoordinated decision-making by a subordinate, no matter how capable, in connection with a set of business deals instrumental in the corporation's plans to restructure and increase its total value. Yet such is Esmark's theory of the case: Copeland and SIPCO acted on their own, without accountability or connection to Esmark. To the contrary, the evidence shows only that Kelly trusted and respected Copeland's abilities, not that Copeland acted alone. Finally, Esmark's arguments are defeated by its own admission that Copeland's acts were ratified explicitly by both Kelly and the Esmark board—a step without which Copeland's plans could not have been executed.[49]

Although we emphasize again that a finding of ''direct participation'' under the court majority's theory is not necessary to find Esmark liable under Section 8(a)(3), and we do not find that Esmark violated Section 8(a)(5) under the majority's test, we find the court's comments in finding that 8(a)(5) liability may be assessed against parent companies under some circumstances relevant to a consideration of Esmark's 8(a)(3) liability. Thus, the court stated: ''The NLRB could permissibly find that a parent corporation should not be permitted to act through its subsidiaries to the detriment of the subsidiaries' workforce and yet escape liability for acts which it has mandated.''[50] We conclude that such a policy effectuates fundamental policies of freedom from discrimination on the basis of union activities under Section 8(a)(3) of the Act no less than it furthers the right to collective bargaining under Section 8(a)(5). Thus, we believe that this policy and our finding here that Esmark is liable for the sham closing, discharge, and reopening scheme that discriminated against the employees at Moultrie and Guymon furthers the fundamental purposes of the Act. At the same time our findings are fully consistent with the economic necessity of providing, in most circumstances, corporate shareholders with protection from liability for the acts of the corporation.

ORDER[51]

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Esmark, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Causing facilities in Guymon, Oklahoma, and Moultrie, Georgia, to be closed and employees at those facilities to be terminated for the purpose of evading obligations under the 1979–1982 master collective-bargaining agreement with the United Food and Commercial Workers International Union, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights granted them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the unit employees of the Guymon, Oklahoma, and Moultrie, Georgia plants of SIC/-SIPCO/New Sipco, Inc. whole for any losses of earnings and other benefits suffered as a result of the discrimination against them as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*.[52]

(b) Mail a copy of the attached notice marked ''Appendix'' to all unit employees of the Guymon, Oklahoma, and Moultrie, Georgia plants affected by this Order at their home addresses, and post at its facilities in Chicago, Illinois, copies of the attached notice marked ''Appendix.''[53] Copies of this notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately

[48] Copeland's conclusory testimony in the reopened hearing to the effect that Esmark did not influence his actions is repeatedly contradicted by his earlier testimony regarding the facts of the structuring of SIPCO and his relationship with Kelly and Esmark. See discussion of his testimony, supra. Although we do not discredit or discount his testimony at the reopened hearing, we accord greater weight to his earlier attestation of the facts as he experienced them than to his repetition of statements amounting to legal interpretations and conclusions at the reopened hearing.

[49] As the court noted, Esmark admitted in connection with its 10(b) defense, rejected by the Board and the court, that the ''decision to reopen the plants and repudiate the master agreement was finally made before the installation of the new board of directors for the entity owning the plants.'' 887 F.2d at 747 fn. 10. Although it notes at fn. 9 of its answering brief that ''SIPCO did not assume that name [or, we note, a separate corporate identity] until October of 1980,'' Esmark sees fit throughout its arguments to attribute actions taken as early as June 1980 to SIPCO. Like the court, we prefer, in analyzing the record, to consult the calendar rather than to rely on Esmark's self-serving nomenclature.

[50] *Esmark, Inc.*, supra, 887 F.2d at 757.

[51] We adhere to our earlier order and find that Esmark is jointly and severally liable with the other respondents found to have violated Sec. 8(a)(3) and (1). Thus, we reject Esmark' arguments to the contrary; the cases cited in its brief are not on point. Moreover, SIC's entry into a settlement agreement with respect to its monetary liability for these violations does not change our result. See *Urban Laboratories*, 305 NLRB 987 (1991).

As we noted in our previous Order, interim earnings shall include payments of closing benefits by Esmark pursuant to the terms of the master agreement. We agree with the General Counsel that Esmark's backpay liability extends until the discriminatees obtain substantially equivalent employment. On the evidence before us, we do not consider the rehire of the unit employees at terms and conditions of employment markedly inferior to those they enjoyed before the unfair labor practices to be substantially equivalent employment.

[52] 283 NLRB 1173 (1987).

[53] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause other employers to close facilities and terminate employees for the purpose of evading obligations under the 1979–1982 master collective-bargaining agreement with the United Food and Commercial Workers International Union, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole the employees of the Guymon, Oklahoma, and Moultrie, Georgia plants of SIC/SIPCO/New Sipco, Inc. for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

ESMARK, INC.

Jeffrey Wolf, Esq., for the General Counsel.
Peter Woodford, Esq. and *Douglas A. Darch, Esq. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Chicago, Illinois, for the Respondent.
Irving M. King, Esq. (Cotton, Watt, Jones & King), of Chicago, Illinois, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. On June 29, 1988, the National Labor Relations Board issued a Decision and Order[1] in this proceeding in which the Board found that Esmark, Inc.[2] violated Section 8(a)(3) and (1) of the Act by actively participating in the decision to close Sipco's facilities at Guymon, Oklahoma, and Moultrie, Georgia, and terminating the employees at those facilities for the purpose of evading obligations under the master collective-bargaining agreement covering them and violated Section 8(a)(5) and (1) of the Act by actively participating in the decision to abrogate the provisions of the master agreement at those facilities when they reopened. The Board ordered that the Respondent cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices.

On October 6, 1989, the United States Court of Appeals for the Seventh Circuit granted the Respondent's petition for review and remanded the case to the Board.[3] The court remanded this proceeding to the Board for ''further factual development'' concerning the Board's ''direct participation'' theory of liability on the part of Esmark for the unfair labor practices found against Sipco.

The Board thereafter accepted the court's remand and after giving due consideration to the record and to the decision of the court of appeals decided to remand the case to me for the purposes of considering the evidence previously adduced and of reopening the record for further hearing on the issue of Esmark's liability in light of the court's decision.

On July 30, 1990, the Board issued its order remanding proceeding to the administrative law judge for further hearing directing me to reopen the record in this proceediny and hold further hearings for the purpose of taking additional evidence consisent with the court's opinion.

In accordance with the Board's Order, on September 6, 1990, I reopened the record and after several delays, occasioned by the filing of various motions and settlement attempts, heard additional testimony on March 19, 1991, then once again closed the hearing.

After carefully reviewing the evidence submitted during the initial hearing, I have determined that there is nothing in that record which was not fully considered by the Board in its Decision and Order dated June 29, 1988, or by the Seventh Circuit in its decision dated October 6, 1989.

At the reopened hearing on March 19, 1991, neither the General Counsel nor the Charging Party called any witnesses to offer testimony in support of the Board's ''direct participation'' theory of liability on the part of Esmark for the unfair labor practices found against Sipco. Similarly, neither the General Counsel nor the Charging Party offered any documentation which might tend to support the Board's theory or undermine the court's decision which specifically found that it was the Board's responsibility to make explicit and comprehensive findings that Esmark ignored its subsidiaries' separate decision making ''paraphernalia,'' if liability were to be imposed on Esmark under the ''diect participation'' theory, and that the Board's findings on this central issue were inadequate.

Respondent, on the other hand, called as its sole witness, John Copeland, who retired in March 1986 as chairman and chief executive officer of Swift Independent Corporation. Copeland credibly testified that prior to April 25, 1980,[4] he had been president of the fresh meats division of Swift & Company and had the responsibility of reporting directly to the president of Swift.

On April 25, however, a meeting was called at which, Don Kelly, chief executive officer of Esmark advised Copeland that both Esmark and Swift Company were getting out of the fresh meat business, effective immediately, and that henceforth Copeland would be reporting directly to Kelly. Kelly informed Copeland that in order to make it possible to sell off the fresh meat division, Copeland should form a corpora-

[1] 289 NLRB 423 (1988).
[2] Herein called Esmark or Respondent.
[3] 887 F.2d 739 (7th Cir. 1989).
[4] All dates are in 1980 unless otherwise noted.

tive structure with its own general counsel, personnel director, and other officers to be sold as a unit.

After April 25, Copeland proceeded to set up the new corporation as Kelly had instructed with very little or no interference from Kelly. The latter did not tell Copeland what to do nor did he ever call him into his office to discuss Copeland's progress. On two occasions Copeland called Kelly to have lunch together where he brought him current with the progress he was making with the realignment. Occasionally, Kelly would visit Swift & Company, still located in the same building where Copeland was working, and they would, by chance, run into each other and exchange a few words relative to Copeland's project. Once, Kelly visited Copeland in his office. Other than these few meetings, Copeland would call Kelly less than once a month to advise him how matters were progressing. There was no formal schedule of meetings, reports, or specific directions from Kelly to Copeland.

During the several months following, Copeland gave Kelly his ideas on the new entity, Sipco, but not in great detail. Personnel to fill the various offices were discussed and Copeland advised Kelly whom he had selected, to fill them. The information was offered in passing, not as a report, since Copeland and Sipco were in the process of separating and would be gone in a few months. By that time Copeland would be the head of Sipco and Sipco would be out from under the Esmark umbrella.

During this period of time, Copeland was being paid by Swift a Company's fresh meat division and was still on its board of directors. His only boss was Kelly. According to Copeland's credited testimony, Kelly never once told him how to set up the new corporation, never gave him an order, and never got involved.

In planning the new corporation, Copeland had to decide which plants he would retain and which of these he would continue in operation and which he would close. He also had to determine how much financial aid he could expect from Esmark and which of Swift & Company's officers he would be permitted to take with him to man Sipco's management. On this latter problem, he worked with Esmark's corporate personnel manager, Bob Palenchar, who had the final determination on whether or not to grant Copeland's requests.

About this time, consideration as being given to the creation of a ESOP[5] whereby stock in the newly created corporation would be offered to Sipco employees. Before proceeding with the ESOP plan, however, it would be necessary to discuss the matter with the Union.[6] To this end, on June 10 the ESOP plan was offered to the Union. On June 23, however, it was rejected.

The morning after the Union rejected the ESOP plan, Kelly called a management meeting at which he advised Copeland that he was closing down the fresh meat operations and would be giving notice to the Union to this effect, in accordance with the labor agreement then in effect.

That afternoon, however, after discussing the situation with the staff of the fresh meat division, Copeland, for the first time, informed Kelly of his idea of creating an entirely new corporation to be sold as a unit; the new corporation to include certain profitable plants while excluding the less profitable ones. This idea was solely Copeland's with input from members of his fresh meat division but none from Kelly or any member of Esmark management. According to Copeland he had not sought nor received advice from the Swift & Company staff outside the fresh meat division in formulating his plan. When Copeland presented his plan to Kelly, the latter determined that it had merit. He called in his chief financial officer and the president of Swift & Company, Joseph Sullivan, and it was decided that Copeland should pursue his plan and that the closing notices should not be sent out as had been decided earlier that day.

After Kelly's decision, on June 4, to permit Copeland to pursue his plan, Copeland was given free reign to decide which fresh meat facilities to keep open and which to close. On June 30, the announcement of plant closings was sent to the Union. This announcement reflected the decisions of Copeland and his staff from the fresh meat division. At the time the announcement was sent, it was not Copeland's intention to reopen any of the facilities listed and it had not yet been decided whether or not the new company would take the closed Guymon and Moultrie plants. Copeland testified, however, that he told his staff that if Esmark would let him have these two plants without any additional cost, Sipco should take them because they had value. Copeland testified that, in the back of his mind, he felt that he might be able to open them on a competitive basis in the future and, if not, they could always be sold. It was Copeland's understanding that the notice of closing with respect to Guymon and Moultrie could always be revoked. Esmark made no decision on behalf of Sipco with respect to these matters. Copeland did not report to Kelly his decision to close Guymon and Moultrie but eventually Kelly became aware of Copeland's plan regarding these plants.

The notice of the closure of Guymon and Moultrie was initially a 6-month notice but there were several extensions. Meanwhile, Copeland and his staff changed their plans with respect to these plants. They decided that the two plants fit into Sipco's ''long-range scheme of things'' and that they should do everything they could to retain these plants and to try to open them on a competitive basis and make them part of the new company. In making this decision neither Copeland nor any member of his staff consulted with Kelly or with anybody else at Esmark. Nor did they ask for advice from them on this matter. Neither Kelly nor anyone else in Esmark's corporate family told Copeland to take Guymon and Moultrie into the new company; nor did they exert any pressure or influence on them to do so. Indeed, according to Copeland, neither Kelly nor anyone else at Esmark ever expressed any interest to him on the subject of whether Sipco should or should not take Guymon and Moultrie into the new company. Likewise they expressed no interest in Sipco's decision as to which plants to close or keep open. These were totally Sipco's decision.

While still in the process of deciding whether or not to keep the Guymon and Moultrie plants, Copeland met several times with representatives of the Union in order to keep them informed of progress being made toward the creation of the new company and to seek relief at certain noncompetitive plants including Guymon and Moultrie which were under the master agreement. The Union, however, was adamant about no granting relief during midterm of the contract.

[5] Employee stock ownership plan. See the original decision in 289 NLRB 423 for details of the ESOP offering.

[6] Herein called the Union.

Faced with the unyielding position of the Union, Copeland and his staff determined, nevertheless, to keep Guymon and Moultrie but to close them, then later reopen them after Sipco had been split off from Swift & Company and Esmark and was under new ownership. Copeland credibly testified that the decision to close and later reopen Guymon and Moultrie was made solely by him and his staff without consultation with anyone else. Kelly did not tell Copeland to reopen the two plants, nor did he or anyone else from Esmark exert any pressure on Copeland to do so. Copeland did not seek advice rom Kelly or others at Esmark as to whether he should or should not reopen Guymon and Moultrie or as to when he should do so; nor did he later seek approval of his decisions on these matters.

Copeland testified that he and Sipco's staff decided that the terms and conditions of employment established at Guymon and Moultrie should be other than those contained in the master agreement, and determined what those terms and conditions of employment should be. Neither Kelly nor anyone from Esmark ever tried to tell Copeland what terms and conditions to establish at the two plants; nor did they tell Copeland to avoid applying the terms of the master agreement. No consultation took place between Sipco management and Kelly or Esmark management on these subjects.

Analysis

Copeland's testimony covered two general areas. The first consisted of a chronological description of events reflecting the circumstances involved in the establishment of Sipco. The second concerned the lack of involvement of Kelly and Esmark's management in Copeland's and Sipco's decisions to establish a new independent corporation, to take possession of certain fresh meat plants, to continue to operate certain of these plants and to close others, to close and later to reopen certain plants including Guymon and Moultrie and, finally, to establish new terms and conditions of employment at these plants different than those provided by the master agreement.

Copeland's testimony concerning the chronology of events was not exhaustive and was, quite clearly not meant to be. Rather, it was a mere synopsis of the testimony offered by Copeland and other witnesses at the original hearing which was exhaustively covered in the decision of the administrative law judge, in the decision of the Board and in the Board's presentation before the Seventh Circuit. This testimony was offered only as a backdrop to Copeland's testimony concerning the involvement of Kelly and Esmark in the decisions of Copeland and Sipco. As such, it contained nothing new and can therefore be legitimately disregarded in the search for additional evidence to support the Board's decision in which it found Esmark in violation of the Act.

With regard to Kelly's and Esmark's involvement in the actions take by Sipco, Copeland testified, as noted above, that neither Kelly nor Esmark had very much to do with the structuring of Sipco. They had no input into which of the plants would be part of Sipco, which would remain open, and which would be closed. They had nothing to do with the decision to close Guymon and Moultrie or with the decision to reopen them again. Finally, they had nothing to do with the decision to refrain from applying the terms and conditions of the master agreement at Guymon and Moultrie nor with the establishment of the new terms and conditions implemented there by Sipco.

In summary, after carefully reviewing the record evidence presented at the initial hearing and giving careful consideration to that which was offered at the supplementary hearing, I conclude that, as a result of these supplementary proceedings, there has been no ''further factual development'' concerning the Board's ''direct participation'' theory of liability on the part of Esmark for the unfair labor practices found against Sipco. Consequently, I recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not, as alleged in the complaint, engage in conduct violative of Section 8(a)(1), (3), and (5) of the Act.

On the basis of these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed in its entirety.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.